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EXAMINER

TRAN LIEN, THUY

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 09/954,491
Filing Date: September 11, 2001
Appellant(s): DERAUD ET AL.

MAILED
JAN 22 2007
GROUP 1700

Michael E. Dergosits
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 11/1/06 appealing from the Office action mailed 2/8/06.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

Brad, Appleton, " Pizza Inversion - a Pattern for Efficient Resource Consumption",
2/12/1999.

Cooking A to Z, 1997, Page 447.

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claims 1-13 are rejected under 35 U.S.C. 103(a) as being unpatentable over the article on "Pizza Inversion" by Brad Appleton.

The article teaches to fold one half of the slice over the other half. It also teaches to fold the pointed end of the slice towards the crust end. (see page 4)

The article does not teach the combination of folding the end portion and then folding one half over the other half and the percent of end portion as claimed.

It would have been obvious to one skilled in the art to combine folding of the end portion toward the crust and then folding one half over the other half if one wanted a closed pocket to further ensure that the topping and sauce will not drip out easily. Both foldings are known and to combine them when one wants a more closed in pocket

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would have been readily apparent to one skilled in the art. The percent of the folded end depends on the length of the slice and how far one wants to fold. This can readily be determined by one skilled in the art. It would also have been obvious to fold pizza slice having any configuration. Wedge shape, round shape and square shape are all conventional shape for pizza.

Claims 14-29 are rejected under 35 U.S.C. 103(a) as being unpatentable over the article on " Pizza Inversion " by Brad Appleton in view of the cookbook " Cooking A to Z".

The article teaches to fold one half of the slice over the other half. It is also teach to fold the pointed end of the slice towards the crust end. (see page 4)

The article does not disclose the combination of folding the end portion and then folding one half over the other half, the percent of end portion as claimed and pizza slice in which an end portion is substantially free of toppings and sauce.

The cookbook shows a pizza slice in which one end is substantially free of topping.

It would have been obvious to one skilled in the to combine folding of the end portion toward the crust and then folding one half over the other half if one want a closed pocket to further ensure that the topping and sauce will not drip out easily. Both foldings are known and to combine them when one wants a more closed in pocket would have been readily apparent to one skilled in the art. The percent of the folded end depends on the length of the slice and how far one wants to fold. This can readily be determined by one skilled in the art. It would also have been obvious to fold pizza

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slice having any configuration. Wedge shape, round shape and square shape are all conventional shape for pizza. As to the end being free of topping and sauce, pizza is a very versatile food product. Many types of crust, topping and sauce can be used. The placement of the topping and quantity of topping and sauce can vary accordingly to taste. It would have been obvious to make a pizza without topping at one end as shown by the cooking depending on the quantity of topping wanted. It would also have been obvious to omit the sauce on a portion of the pizza depending upon the quantity of sauce wanted.

(10) Response to Argument

On page 15 of the appeal brief, appellant argues there is no established *facie* case of obviousness based only on the Appleton article because it fails to teach or suggest applying the combination of folds and to recognize appellant's problem to be solved. This argument is not persuasive. The article teaches folding lengthwise or folding the pointed end toward the crust. Folding one way does not totally enclosing the sauce and topping; this is readily recognized by one skilled in the art. The combination of folding will give a more total enclosure. Also, the combination of fold will give a smaller configuration which facilitates handling. All these variations would have been readily apparent to one skilled in the art. There is wide variation in the way people consume food products. When both ways of folding are known, the use of the combination of the folds is a variation that would have been readily apparent to one skilled in the art. As to failing to recognize the problem, the claims only recite a method of configuring a slice of pizza pie and the product resulting from such configuration.

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There is no functional recitation in the claims. Furthermore, it is readily apparent that if the pizza is folded, the cheese, sauce and topping will be enclosed and this will prevent spilling or dripping of the sauce, cheese and topping. It would also have been readily apparent to one skilled in the art that two folds will give a better enclosure and this further prevent the dripping of the sauce, topping and cheese. Appellant further argues one would expect the traditionally flat pizza slice to be thickened and stiffened by one fold and to resist a second fold. This argument supports a position that whether one skilled in the art will form one fold or two also depends on the size of the slice of pizza and the thickness of the pizza. If the slice is large and one fold still gives a big product. One would be motivated to fold it again to make the product more compact. Thus, in addition to enclosing the filling, one would also fold more than one to make the product smaller for easy handling. If the pizza slice is too thick such as a deep dish pizza, one would be more likely to make just one fold. Thus, there are several factors in the determination to make one fold or two folds and all these factors are within the determination of one skilled in the art. Appellant's argument tends to imply that the claimed method is not feasible because there is no thickness requirement in the claims. The essential question is whether these folds are known to be done on a pizza slice and this question is explicitly answered in the article. A 103 rejection must take into consideration the level of skill of one in the art and folding pizza slice is well within the skill of one in the art as shown in the article. The determination of the number of fold is also based on individual preference. While one might prefer one lengthwise fold; other might prefer combination of folds to make the product compact for easy handling. On

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page 16 of the appeal brief, appellant argues hindsight is used in the rejection. The examiner respectfully disagrees with appellant. A rejection is not based on hindsight if the prior art teaches or suggests what is being claimed. The fact that the article teaches that the pizza slice can be folded transversely or lengthwise suggests that a combination of folds can be done on the pizza slice because if both types of folds are known to be used, then it would have been obvious to use them at the same time. The desirability or motivation to combine the folds is set forth above. To reiterate, one would be motivated to combine the folds to form a more closed pocket to prevent toppings and sauce from dripping out and also to reduce the size of the pizza slice which facilitates handling.

On pages 17-18 of the appeal brief, appellant makes reference to the Halperin Declaration. The declaration sets forth a series of works done by Mr. Marc Halperin and his opinion on how the combination of folds to the pizza slice was new and not obvious. However, the declaration does not set forth any evidence to show how or why the combination of folds would not have been obvious to one skilled in the art. The declaration does not contain information, showing, evidence, fact to show that one skilled in the art would be discouraged from folding the pizza slice both lengthwise and pointed end up. Both of the folds are known as shown by the article and to combine these folds would have been obvious to one skilled in the art as set forth in the rejection. The declaration does not have any showing of fact to dispute this position. While stating that the elimination of topping in certain area would not have been obvious, the

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declaration does not have any evidence to support this statement. Thus, the declaration is not found to be persuasive. Opinion does not equate to factual evidence.

On page 20 of the appeal brief, appellant argues the cookbook shows a whole pizza with at least cheese throughout the entire surface and a close inspection shows vegetable topping in the center of the pizza. While the pizza has cheese throughout the surface, the cookbook does show that the other toppings are limited to certain area and other vegetable is scattered on the surface. What the cookbook suggested is the versatility in making pizza. For example, it would have been obvious to omit the cheese in one area if one wants to reduce the fat content and calorie of the pizza or to use a lot of topping or little in any place on the pizza depending on the flavor and taste wanted. The placement of topping, the amount and the location would have been an obvious matter of choice. Appellant further argues no matter how versatile pizza is, the consumer would not omit toppings from only a tip portion of a pizza slice. Where the topping is removed is a matter of individual preference and convenient. If a filling is not wanted at the tip, it would have been obvious to remove it from the tip. Appellant also makes reference to the declaration. The declaration is not found to be persuasive as addressed above. Appellant states that in view of the declarant vast experience and knowledge, the opinion set forth in the declaration is a fact itself. The examiner respectfully disagrees with this assertion. Opinion does not equate to factual evidence. There is no evidence set forth in the declaration that the consumer would not accept a pizza with cheese and toppings missing from a significant area. The declaration only contains opinion with no factual evidence to support such opinion. For example, Mr.

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Halperin states in the declaration "to the contrary, the consumer probably would not accept a pizza with cheese and toppings from a significant area". The word "probably" demonstrates that the declarant does not know for a fact that the consumer will not accept such pizza.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

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